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No. 85-1486

In the Supreme Court

of the United States

OCTOBER TERM 1985

LOCAL 32, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
Petitioner,

vs.

PACIFIC MARITIME ASSOCIATION, CRESCENT CITY MARINE WAYS AND DRYDOCK COMPANY, INC., AND NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CRESCENT CITY MARINE WAYS AND DRYDOCK COMPANY, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the United States District Court for the Western District of Washington's decision not to enforce Arbitrator Kagel's award of contract damages to members of the International Longshoremen's and Warehousemen's Union, Local 32, for Crescent City Marine Ways and Drydock Company, Inc.'s failure to assign them certain work, where a prior NLRB Section 10(K) determination awarded the disputed work to employees represented by a different union.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 773 F.2d 1012 (1985) and is reproduced in Appendix A of petitioner's brief. The Order of the Court of Appeals denying rehearing is reproduced in Appendix B of petitioner's brief. The unreported Order of the District Court is reproduced in Appendix C of petitioner's brief. The Decision and Order of the National Labor Relations Board is reported at 271 NLRB No. 123 and is reproduced in Appendix D of petitioner's brief. The Decision and Determination of Dispute of the National Labor Relations Board is reported at 256 NLRB No. 24 and is reproduced in Appendix E of petitioner's brief.

JURISDICTION

This Court has jurisdiction pursuant to §1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

This case involves the application of Sections 8(b)(4)(ii)(D) and 10(K) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. §158(b)(4)(ii)(D) and §160(K), and Section 301(a) of the Labor Management Relations Act ("the LMRA"), 29 U.S.C. §185(a). The foregoing statutory provisions are reproduced in Appendix F of petitioner's brief.

STATEMENT OF THE CASE

I. HISTORICAL PERSPECTIVE

Since 1902, Weyerhaeuser Company ("Weyerhaeuser") has owned and operated a dock in Everett, Washington. The

dock, which sits adjacent to Weyerhaeuser's Thermo-Mechanical wood pulp mill ("T-M Mill"), has traditionally been used to facilitate loading products of both Weyerhaeuser and other manufacturers aboard ships for transportation to distant ports. The work at the dock has always consisted of tying up and casting off ships; transporting cargo from warehouse to shipside; hooking cargo onto the gear of the ships; and loading cargo aboard the vessels. Weyerhaeuser employees, represented by Local 20, Association of Western Pulp and Paper Workers ("Local 20"), have historically been responsible for tying up and casting off ships, and transporting cargo from warehouse to shipside. The remaining dock work has always been performed by employees of local stevedoring companies such as Crescent City Marine Ways and Drydock

Company, Inc. ("Crescent City").

The Pacific Maritime Association ("PMA") is an employer association comprised of numerous stevedoring companies, including Crescent City. At all times material to this dispute, PMA was a party to a collective bargaining agreement with Local 32, International Longshoremen's and Warehousemen's Union ("Local 32"). The agreement, commonly referred to as the "Pacific Coast Longshore Contract Document" ("PCLCD"), required that signatory stevedoring companies employ members of Local 32 to carry out longshore tasks. At all times material to this dispute, Weyerhaeuser, which has never been a member of PMA nor a signatory to the PCLCD, maintained an agreement with Crescent City to load cargo onto vessels from shipside at the Everett, Washington dock.

Sometime in late 1980, Weyerhaeuser closed its T-M Mill. The dock's operations, however, continued just as they had prior to the closure. Weyerhaeuser employees (members of Local 20) were still responsible for tying up and casting off ships, and moving cargo from warehouse to shipside.[1] Crescent City employees (members of Local 32) continued to attach the shipside cargo to the vessels' gear and load it aboard ship just as they had done for years prior to the closure.

On December 21, 1980, following the closure of the T-M Mill, the stevedoring employees (members of Local 32), claiming that its contract with PMA required Weyerhaeuser to assign them the work historically performed by Local 20

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[1]Upon the closing of the T-M Mill, Weyerhaeuser employees, who had been represented by Local 20, affiliated with Local 10 of the same union.

workers, engaged in a 45 minute work stoppage at the Everett, Washington dock.[2] Shortly thereafter, Weyerhaeuser filed an Unfair Labor Practice charge with the National Labor Relations Board ("Board"). The complaint alleged Local 32 violated §8(b)(4)(ii)(D) of the Act by engaging in a work stoppage with the sole purpose of forcing Weyerhaeuser to assign its members the work in dispute. Pursuant to §10(K) of the Act, 29 U.S.C. 160(K), the Board conducted a hearing on the matter.[3]

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[2]It is Local 32's contention that upon closing the T-M Mill at the Everett dock, said dock ceased to be an "industrial dock" and became a "commercial dock." The union asserts that pursuant to its agreement with PMA, its members should now be entitled to perform the work in dispute.

[3]The hearing was held before the Board on January 19, 1981. All parties were present and afforded a fair opportunity to present their claims and defenses.

II. BOARD DETERMINATION

On May 27, 1981, the Board issued its Decision and Determination of Dispute (reproduced in Appendix E of petitioner's brief). The Board awarded the disputed work to Weyerhaeuser's employees (Local 10 members). Id. The Board's decision was based upon:

1. The expressed preference of the employer;

2. The relative skills of both unions;

3. The long standing history of assigning the disputed work to Local 10 members; and

4. The fact that the contract between Local 32 and PMA gave deference to existing work assignments. Id. at pages A-50-55.

After Local 32 agreed to comply with its determination, the Board dismissed the Unfair Labor Practice charges. Id.

III. ARBITRATION PROCEEDING

Pursuant to its collective bargaining agreement with Crescent City, Local 32 presented its claim in arbitration.[4] This proceeding was commenced concurrently with the Board action.

Four months after the Board's determination, Arbitrator Sam Kagel issued his decision. Contrary to the Board's decision, he concluded the work in dispute should have been assigned to Local 32 members following the closing of Weyerhaeuser's T-M Mill. Moreover, he awarded Local 32 members "time-in-lieu" payments to remedy the wrongful work assignment.

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[4]Local 32 and Crescent City were the only parties present at this proceeding. Weyerhaeuser and Local 10 were not parties to the subject collective bargaining agreement. Therefore, they were not given an opportunity to be heard.

IV. DISTRICT COURT PROCEEDING

Following Arbitrator Kagel's determination, in breach of its agreement to abide by the Board's determination, Local 32 sought enforcement of the arbitration award. It filed "payment-in-lieu" grievance claims and commenced suit under §301(a) of the LMRA, 29 U.S.C. §185(a), to enforce the arbitration award. Contrary to Local 32's position, however, the court found Arbitrator Kagel's award to be in direct conflict with the Board's prior determination. The U.S. District Court for the Western District of Washington ("District Court") refused to enforce the arbitration award.

V. SUBSEQUENT BOARD DETERMINATION

In response to Local 32's §301 suit to enforce the conflicting arbitration award, the Board reinstated the Unfair Labor Practice charges. It also

determined that by filing the "payment-in-lieu" claims and the §301 suit, Local 32 had failed to comply with the Board's §10(K) determination and violated §8(b)(4)(ii)(D) of the Act.

VI. COURT OF APPEALS

Thereafter, Local 32 filed a petition before the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") for review of the Board's Unfair Labor Practice claim and the District Court's refusal to enforce the arbitration award. The Board cross-applied for enforcement of its Unfair Labor Practice claim.

The Court of Appeals affirmed the District Court's decision and held that the Board's §10(K) work assignment determination precluded enforcement of Sam Kagel's subsequent conflicting arbitration award. 773 F.2d 1012 (1985) (reproduced in Appendix A of

petitioner's brief). The Court also enforced the Board's §10(K) determination and its holding that Local 32's attempt to seek enforcement of a contrary subsequent arbitration award constituted a violation of §8(b)(4)(ii)(D) of the Act. Id.

Local 32 has filed a petition for writ of certiorari. Respondent Crescent City will only address the issue whether the Court of Appeals erred by deciding that a prior Board §10(K) work assignment determination took precedence over a subsequent conflicting arbitration award.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

This Court grants review on writ of certiorari only when there exists "special and important reasons." Sup. Ct. R. 17.1. The instant case, however,

does not present the requisite circumstances for the Court to grant review. The Ninth Circuit's interpretation of the federal laws applicable to this case was proper. Moreover, there is no conflict between the Ninth Circuit's holding and that of the other circuits. Therefore, petitioner's request for writ of certiorari should be denied.

I. THE SUPREMACY DOCTRINE BARS THE COURT FROM ENFORGING AN ARBITER'S AWARD WHICH IS INCONSISTENT WITH A PRIOR §10(K) BOARD DETERMINATION.

Pursuant to §10(K) of the Act, the Board is required to "hear and determine" labor jurisdictional disputes when either union involved has been charged with an Unfair Labor Practice under §8(b)(4)(D) of the Act. 29 U.S.C. §160(K). Though the guidance of this Court, it has become well established that a prior Board §10(K) determination

will take precedence over a subsequent inconsistent arbitration award.[5] In order to promote uniformity of the resolution of these types of labor disputes, the judiciary consistently defers to the wisdom of the Board. Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964); Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 269 (1974); See also, Local Joint Executive Board v. Royal Center, Inc., 754 F.2d 835 (9th Cir. 1985); Carpenters Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1278 (9th Cir. 1984).

In Carey, this Court was asked to consider the appropriateness of arbitration as an alternative forum for settling work assignment disputes.

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[5]This rule is commonly referred to as the "Supremacy Doctrine."

Although it was concluded that arbitration is an appropriate alternative when no economic action or charges of §8(b)(4)(D) conduct exists, this Court did emphasize that "[t]he superior authority of the Board may be invoked at any time." 375 U.S. at 272. Moreover, the Court clearly announced that when the Board acts to resolve a work assignment dispute, its determination shall take precedence over and preclude enforcement of a contrary arbitration award. This rule holds true whether the arbitration remedy is an actual award of the disputed work or an award of damages. In fact, Justice Douglas, writing the opinion for the Court, stated:

> "Should the Board disagree with the arbiter...the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with the ruling, it would not be liable for damages under Section 301."

In the instant case, Weyerhaeuser filed an Unfair Labor Practice charge against Local 32, alleging that the union violated §8(b)(4)(D) of the Act by engaging in activity with an objective of forcing or requiring Weyerhaeuser to assign the work of handling vessel lines and moving cargo from warehouse to shipside to its members rather than members of Local 10. On January 19, 1981, the Board held a §10(K) hearing on the matter. All parties appeared and were afforded full opportunity to present their respective claims. After reviewing the evidence introduced, the collective bargaining agreement involved, the industry practices, the relative skills of the employees involved, the economy of the operations, and the employer's preference, the Board concluded Local 10 was entitled to perform the work in dispute.

Approximately four months after the Board made the foregoing determination, Arbitrator Sam Kagel issued his opinion and decision.[6] He concluded the work in dispute should have been assigned to Local 32 members. On the issue of damages, he held Local 32 members were entitled to "time-in-lieu" payments.

The Board's determination and Arbitrator Kagel's award are mutually exclusive. There exists no means to conceptualize consistency between the two decisions. Therefore, pursuant to the well established rule that the Board's prior §10(K) determination takes precedence over a subsequent inconsistent arbitration award, the Court of Appeals' decision to enforce

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[6]The arbitration proceeding involved PMA and Local 32.

the Board's determination was proper. The law is clear. No grounds exist for the United States Supreme Court to review this issue.

II. PETITIONER'S ARGUMENT THAT THE BOARD'S DECISION AND ARBITRATOR KAGEL'S AWARD ARE CONSISTENT IS WITHOUT MERIT.

In an attempt to circumvent the "Supremacy Doctrine" and create the illusion that no inconsistency exists between the decisions of the Board and Arbitrator Kagel, petitioner asserts that the Ninth Circuit Court of Appeals' decision in Associated General Contractors of America, Inc. v. I.U.O.E., Inc. Local 701, 529 F.2d 1395 (9th Cir.) cert. den. 429 U.S. 822 (1976) ("AGC") and this Court's holding in W.R. Grace and Company v. Local Union 759, 461 U.S. 757 (1983) ("W.R. Grace")

are controlling in this case. An analysis of the facts of the instant case and those presented in AGC and W.R. Grace, however, removes the illusion of congruity and it becomes vivid, as stated by the lower Court (which heard both the instant and AGC cases), these cases are distinguishable. (See page A-7 of petitioner's brief).

In the instant case, Arbitrator Kagel awarded the disputed work to Local 32. On the issue of damages, he ordered Crescent City to compensate Local 32 members for what he determined was a breach of its collective bargaining agreement with the union. Arbitrator Kagel's award is completely contrary to the Board determination that Local 10 was entitled to the disputed work. The Board's determination does not recognize that respondent breached its agreement with Local 32. Therefore, any

arbitration award of damages for said breach would be in direct conflict with the Board's prior decision. Moreover, the Board's determination that Local 10 was properly entitled to the disputed work assignment is irreconcilable with Arbitrator Kagel's conclusion that Local 32 is entitled to the disputed work. Thus there exists no means to conceptualize any type of symmetry between these two decisions.

In light of the foregoing, petitioner still argues the two decisions are consistent. Local 32 contends that the Board's §10(k) determination only affirmatively requires that Local 10 members (Weyerhaeuser employees) be assigned the disputed work. It does not require PMA and its members (e.g. Crescent City) to act or refrain from acting in any manner. Therefore, as petitioner asserts, PMA and its members

are free to refuse to contract with Weyerhaeuser. If they did not do business with Weyerhaeuser, Local 32 contends neither PMA nor its signatories would be part of an arrangement where the disputed work would be assigned to Local 10 in violation of its agreement with Local 32. Local 32 goes on to conclude that by refraining from contracting with Weyerhaeuser, PMA and its members could comply with both Arbitrator Kagel's decision and the Board's determination. It is petitioners conclusion that PMA and its members can fulfill their obligations to Local 32 without violating the Board's §10(K) termination. Thus, it is the Union's position that the decisions of Arbitrator Kagel and the Board are truly consistent. To support its position, petitioner relies on AGC and W.R. Grace.

A. THE HOLDING IN AGC IS INAPPLICABLE TO THE INSTANT CASE.

AGC involved the following facts: Western-Pacific Piledriving Corporation ("Western Pacific") was an employer member of the Associated General Contractors ("AGC") and a party to AGC's collective bargaining agreement with the IUOE. The AGC-IUOE agreement contained a provision prohibiting subcontracting of concrete pumping work to a non-signatory employer. Notwithstanding that agreement, Western-Pacific subcontracted concrete pumping work at one construction site to a second employer, which had a collective bargaining agreement with the Teamsters. Pursuant to its Teamsters' contract, the subcontractor assigned the pumping work to a Teamster member employee. IUOE, through its contract grievance procedure,

asserted that the AGC member, Western-Pacific, was required to assign the work to a member of IUOE. As a result of the work assignment dispute, the Board conducted a hearing on the matter. In its §10(K) determination, the Board concluded the concrete pumping work was properly assigned to Teamster member employees whenever an AGC member contracted that work to a Teamster subcontractor. Id. at 1396.

The Court of Appeals in AGC expressly recognized that once a Board §10(K) determination issues, "no court [may] be permitted to impair compliance with it." Id. at 1397. However, the Court noted that in some cases it is possible that the granting of contractual damages may not conflict with the Board's §10(K) decision. Id. at 1398-99. The Court found that Western-Pacific and other AGC members

could have complied with their IUOE agreement and assigned the disputed work to IUOE employees or an IUOE subcontractor without violating the Board's §10(K) award. This conclusion was possible solely because the Board's §10(K) award in favor of the Teamsters was limited by its own terms to work sites where the pumping work was subcontracted to an employer which was a party to a Teamster collective bargaining agreement.[7] Id. at 1389. Thus, as long as AGC members complied with their collective bargaining agreement and assigned the pumping work to an IUOE employee or IUOE subcontractor, the Board's §10(K) determination would not be applicable.

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[7]The Board determination by its terms only applied "whenever" the employer contracted the disputed work to a Teamster subcontractor. The Board made no unconditional work assignment ruling.

As expressly noted by the lower court, the instant case is distinguishable from AGC on two grounds.

1. THE BOARD'S §10(K) DETERMINATION IS UNCONDITIONAL.

In our case, there are no limitations or conditions on the Board's §10(K) award. The Board simply ordered that "Employees of Weyerhaeuser Company, who are represented by Association of Western Pulp and Paper Workers, Local 10, are entitled to perform the work of the handling of cargo from the warehouse or last point of rest to shipside and the tying up and casting off lines of vessels at the Employer's dock in Everett, Washington." (See Appendix E of petitioner's brief at page A-54). It was therefore impossible for Weyerhaeuser or any PMA employer to comply with the Local 32 contract and assign the disputed work to a member of

Local 32 without violating the Board's §10(K) determination. In direct contrast, however, the employer in AGC could comply with the arbitration award without violating the Board's §10(K) determination by simply assigning the disputed work to IUOE members.

2. CRESCENT CITY HAS NO CONTROL OF WEYERHAEUSER'S WORK ASSIGNMENTS.

In our case, PMA and its signatories (e.g. Crescent City) have no control over Weyerhaeuser's assignment of work. Weyerhaeuser is the primary employer and had complete control over the assignment of the disputed work. Thus, any breach which occurred in the instant case cannot be characterized as "voluntary" on the part of PMA or its signatories. In AGC, on the other hand, the party who owed the contractual duty to the union was also the primary

employer and had complete control over the work assignment at issue. Therefore, they could control whether the arbitration award was breached. Thus, if it breached the agreement, said breach was "voluntary." In contrast, as already stated, in our case, neither Crescent City nor other PMA signatories can compel Weyerhaeuser to assign the disputed work to either themselves or Local 32 members. Weyerhaeuser is the primary employer and it has no contractual relationship with Local 32.

Even in light of the foregoing significant distinguishing factors, Local 32 contends that Crescent City could have complied with its collective bargaining agreement without violating the Board's §10(K) determination. Local 32 suggests that Crescent City could have complied by refusing to provide stevedoring services at the Everett dock

for Weyerhaeuser and other employers not signatory to a Local 32 contract. In order to support this argument, petitioner refers to the facts of AGC. As already noted, in that case, if AGC member, Western-Pacific, had ceased subcontracting to non-IUOE employers, it would have retained control over the concrete pumping work which it could then have assigned to members of IUOE in accordance with its collective bargaining agreement without violating the Board's §10(K) determination. In our case, however, as already noted, the only work on the Everett dock allotted to PMA members such as Crescent City was the taking of goods from ship side and loading them onto the vessels. The disputed work of moving goods from storage to shipside and tying up vessels was retained and assigned by Weyerhaeuser to Weyerhaeuser employees

represented by Local 10. Clearly, if Crescent City, at Local 32's urging, had refused to perform the loading work traditionally contracted to PMA members, such action would not have brought Crescent City into compliance with its contractual duty of assigning the disputed work to Local 32 members. Rather, it would have eliminated the only work available to PMA members on the Everett dock; left Crescent City liable for time-in-lieu claims for the disputed work assigned by Weyerhaeuser to its employees; and invited additional unfair labor practice charges against Local 32 for violation of

§8(b)(4)(ii)(B) of the Act. 29 U.S.C. §158(b)(4)(ii)(B).[8]

Based upon the foregoing, it is clear that the facts of AGC are distinguishable from the facts in the

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[8] §8(b)(4)(ii)(B) of the Act provides:

> "It shall be an unfair labor practice for a labor organization or its agents-...to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:...
>
> (B) forcing, or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

instant case and the holding is therefore inapplicable. In contrast with AGC, in our case the Board's §10(K) determination is unconditional. Moreover, the primary employer in our case (Crescent City), unlike the situation presented in AGC, has no control over the disputed work assignment.[9]

B. THE HOLDING IN W.R. GRACE IS INAPPLICABLE TO THE INSTANT CASE.

To further support its contention that Arbitrator Kagel's award of damages was proper and should be enforced, petitioner relies on the case of W.R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983). In that case, this

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[9]The Court of Appeals, in its extensive opinion, outlined these facts and concluded the instant case was clearly distinguishable from AGC. (See Appendix A of Petitioner's brief at page A-7).

Court was presented with a dispute arising out of the union's attempt to hold the employer liable for failing to retain certain employees in specific job positions. The Federal District court found public policy prevented enforcement of an arbitrator's award construing a collective bargaining agreement against the employer who was acting pursuant to an agreement with the Equal Employment Opportunity Commission ("EEOC"). While the Company, by removing a certain group of employees from their job classifications, was complying with its EEOC obligation, it also simultaneously breaching the collective bargaining agreement with the union. The union asserted that since the decision to withdraw the employees from their particular job responsibilities was totally within the company's control, it should be liable for

all damages arising therefrom.

This court noted the issue was one of control. Unlike the predicament of PMA and Crescent City in the instant case, this Court observed in W.R. Grace that the "dilemma ...was the company's own making. The company had committed itself voluntarily to two conflicting contractual obligations." Id. at 767. Therefore, breaches arising from non-compliance were left sitting on the employer's lap. It was held that the arbitrator's award was proper. Id. at 772.

As stated above, neither PMA nor Crescent City had any control over the assignment of the disputed work in the instant case. All control remained with Weyerhaeuser, the primary employer. Therefore, neither PMA nor Crescent City should have to sleep in a bed they did not make. W.R. Grace is inapplicable to

the instant case.

CONCLUSION

Arbitrator Kagel's award is clearly inconsistent with the Board's prior §10(K) determination. In accordance with the "Supremacy Doctrine," the Board's decision must take precedence over Arbitrator Kagel's inconsistent determination. Since this Court's decision in W.R. Grace and the Ninth Circuit Court of Appeals' decision in AGC are not controlling in this case, it is clear the Court of Appeals did not err when it concluded the Board's determination must take precedence over the subsequent inconsistent arbitration award. Therefore, no grounds exist for the Court to grant Local 32's petition for writ of certiorari with respect to

the enforcement of Arbitrator Kagel's award.

Respectfully submitted,

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